IN THE

Supreme Court of Missouri

No. SC92978

JOHN ROE,
Appellant,

v.

COLONEL RON REPLOGLE, et al.,
Respondents.

Appeal from the Circuit Court of Jackson County, Missouri
The Honorable Peggy Stevens McGraw, Circuit Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the Memorandum Order and Judgment of the Circuit Court of Jackson County, Missouri, the Honorable Peggy Stevens McGraw, granting summary judgment on all counts of Appellant John Roe's Petition for Declaratory and Injunctive Relief. *John Roe I v. Colonel Ron Replogle*, *et al.*, Judgment, Case No. 1016-CV06468 (September 26, 2012). L.F. 104-05; App. A1-A2. Appellant Roe sought a declaration that Respondents' interpretation and application of the Federal Sexual Offender Registration and Notification Act (SORNA), 42 U.S.C. §§ 16901 to 16929 and Missouri's Sexual Offender Registration Act (SORA), MO. REV. STAT. §§ 589.400 *et seq*.[1],was unconstitutional as applied to him and sought to enjoin its enforcement. Roe contends that Congress violated the nondelegation doctrine by giving the U.S. Attorney General blanket authority to determine the applicability of SORNA to offenders, such as Roe, who were convicted of sex offenses prior to SORNA's enactment rendering a requirement that he register unconstitutional; that requiring

[1]The relevant statutory and regulatory material appears in the Appendix at App. A7-A20. Inasmuch as the Appendix Table of Contents clearly indicates where each provision can be found, references to statutes will be to the statutory section designation only.

him to register under SORNA violates the United States Constitution's prohibition of *ex post facto* laws; that SORNA's guidelines establish that Roe need not register; that SORNA contemplates yielding to state constitutional law when it conflicts with SORNA's requirements; that neither SORA nor SORNA provide a valid basis to prosecute Roe for failure to register; and, that registration and the ever-increasing statutory and regulatory burdens imposed on registrants cumulatively have become so substantial and onerous as to violate Roe's substantive due process rights. Accordingly, this appeal involves the validity and constitutionality of a United States statute and falls within the exclusive appellate jurisdiction of the Missouri Supreme Court pursuant to Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

1. Introduction

On November 28, 1994, John Roe pleaded guilty to a sex crime in the Circuit Court of Jackson County, Missouri, having been advised that if he did so, he would receive a suspended imposition of sentence, and, if he met the conditions of probation after three years, the matter would be finished. Both the prosecutor and his own attorney advised Roe that it was a good deal for him. Roe successfully completed his probation, including sexual abuse counseling. But Roe has had no repose – complying with and being excused from registration requirements as the law has continued to evolve – and the matter still is not finished nearly twenty years later. Under this Court's opinion in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. *banc* 2006), Roe cannot be required to register under Missouri's sex offender registration act ("SORA") because his conviction predated SORA's January 1, 1995, effective date and as to him, it is impermissibly retrospective in operation. But, in 2006, the United States Congress enacted the Sex Offender Registration and Notification Act ("SORNA") which, *inter alia*, makes it a federal crime for any person (1) who is "required to register under [SORNA]," and (2) who "travels in interstate or foreign commerce," to (3) "knowingly fail] to register or update a registration." 18 U.S.C. § 2250 (a). Now,

in the wake of this Court's opinion in *Doe v. Keathley*, 290 S.W.3d 719 (Mo. *banc* 2009), holding that an independent registration requirement arises under SORNA, Respondents are again insisting that Roe register. Seeking a declaration that he need not register and to enjoin Respondents from prosecuting him under either SORA or SORNA, Roe brought suit.

Roe's Case

In the presence of her classroom teacher, Roe's seven year old stepdaughter commented that Roe had touched her rear sometime during the fall of 1993, when she was then six years of age. L.F. 87, Affidavit at ¶ 1. The teacher called the police and an investigation ensued. *Id.* at ¶ 2. Despite investigators' efforts to get Roe to admit that he had touched his stepdaughter's private area, he denied any intentional touching, but admitted that he could have touched her accidentally. Roe then denied and still maintains that there was never any penetration of his stepdaughter. *Id.* at ¶ 3. Indeed, neither Roe's wife nor her family, nor his family, wanted the allegation pursued, but regardless, Roe was charged with sodomy, a felony. *Id*. at ¶ 4; L.F. 62 at ¶¶ 2, 3.

Roe had been advised that if he pleaded guilty to the charge of sodomy he would receive a suspended imposition of sentence and, if he met the conditions of his probation, after three years, the matter would be finished; under Missouri law, a suspended imposition of sentence does not result in a conviction. L.F. 88 at ¶ 5;

L.F. 90 at ¶ 24. Roe's defense attorney and the prosecutor told him it was a good deal for him, and so, on November 28, 1994, he pleaded guilty to sodomy. L.F. 88 at ¶ 6; L.F. 62 at ¶ 2.

Roe successfully completed sexual abuse counseling and obeyed court orders regarding contact with his stepdaughter while on probation and engaged in supervised visitation as approved by his probation officer and the Division of Family Services. L.F. 88 at ¶¶ 7, 8. The judge[2] extended Roe's visitation rights in 1996 and thereafter, his wife was allowed to supervise the visits. *Id.* at ¶ 9. Ultimately, the Court reunified Roe's family and his stepdaughter returned to live with Roe and his wife. *Id.* at ¶ 10.

Roe and SORA

In 1994, the same year that Roe entered his guilty plea, Missouri enacted – at the insistence of the federal government – a Megan's Law, a sex offender registration act ("SORA"). MO. REV. STAT. §§ 589.400 to 589.425, Supp. 1999. By an amendment in 2002, it became generally applicable instead of applicable only to those offenders moving into a county.[3] Missouri applied its SORA

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[2]The Hon. John I. Moran.

[3]2002 Mo. Laws S.B. Nos. 969, 673, and 855, 2002 Mo. Legis. Serv. 855 (occasioned by *J.S. v. Beaird*, 28 S.W.3d 875 (Mo. banc. 2000)).

retroactively to 1979, and for life, to thousands of Missourians – as well as those convicted in other states who move to Missouri. When SORA became effective on January 1, 1995, the Jackson County Sheriff requested that Roe begin registering as a sex offender and he complied. L.F. 88 at ¶ 12. After this Court decided *J.S. v. Beaird*, 28 S.W.3d 875 (Mo. *banc* 2000), holding that registration was only required if the individual established a new residence in a county by "coming into" that county after the law's effective date, Roe, who had never moved from Jackson County, obtained an order expunging his name from the registration list and stopped registering. L.F. at 88-89 ¶ 13.

The Missouri legislature amended SORA in 2003 to eliminate the "coming into" language and require registration of sex offenders within ten days of that legislation's effective date. L.F. at 89 ¶ 14. Roe became a plaintiff – John Doe VIII – in *Doe v. Phillips*, but in February, 2006, when police appeared at his door and told him he needed to register the following day, Roe registered again. *Id.* at ¶¶ 15, 16. However, he contacted his counsel in the *Doe v. Phillips* litigation and counsel arranged to stay the requirement that Roe register, pending the outcome of that case. *Id.* at ¶ 17. On June 30, 2006, in *Doe v. Phillips*, this Court held that as to those offenders who were convicted prior to SORA's January 1, 1995, effective date, the application of the registration requirement based on their pre-SORA conduct was retrospective in its operation and invalidated the registration

requirements as to those who were convicted or pled guilty prior to January 1, 1995. *Id.* at ¶ 18; *Doe v. Phillips*, 194 S.W.3d at 852. Because Roe's plea was taken on November 28, 1994, Roe was no longer required to register. *Id.* at ¶ 19.

Roe and SORNA

In 2006, the United States Congress enacted SORNA which, among other things, imposed registration requirements and created a new felony that penalizes sex offenders who are required to register under SORNA, but knowingly fail to do so after traveling in interstate or foreign commerce. 42 U.S.C. § 16901 *et seq*.; 18 U.S.C. § 2250 *et seq*.; L.F. 89-90 at ¶ 20. By one provision in SORNA, Congress delegated to the Attorney General the "authority to specify the applicability" of the statute's registration requirements to sex offenders convicted prior to SORNA's enactment. 42 U.S.C. § 16913 (d); L.F. 66 ¶ 26. Thus, with respect to SORNA, Roe is a "pre-act" and "pre-implementation" offender. L.F. 90 at ¶ 21.

On February 28, 2007, the Attorney General issued an interim regulation which stated that SORNA's registration requirements applied to all sex offenders, including those who pled guilty or were convicted prior to SORNA's enactment. 72 Fed. Reg. 8897 (codified at 28 C.F.R. § 72.3). Subsequently, on January 28, 2011, the Attorney General published a Final Rule to that effect. 75 Fed. Reg. 81849-81850; L.F. 67 at ¶ 28; L.F. 90 at ¶ 22.

In June, 2009, this Court handed down an opinion in *Doe v. Keathley*, 290

S.W.3d 719 (Mo. *banc* 2009), holding that an independent registration requirement arises under SORNA which operates to require registration irrespective of any allegedly retrospective state law that had been enacted and that might be subject to Missouri's constitutional ban on the enactment of retrospective state laws. *See Doe*, 290 S.W.3d at 720; L.F. 67 at ¶ 29; L.F. 90 at ¶ 23. However, before Roe was required to register, on January 8, 2010, the then Hon. Richard G. Callahan entered a declaratory judgment in *Doe v. Keathley*, Cole County Circuit Court Case No, 06-AC-CC01088, in which he held that to trigger the SORNA registration requirements, an offender must be convicted, and recognizing that, under Missouri law, a suspended imposition of sentence is not a conviction, he concluded that Doe was not required to register. *Doe v. Keathley*, Judgment, No. 06AC-CC01088 (A-4-A-6); L.F. 67 at ¶ 30; L.F. 90 at ¶ 24. Because Roe had received a suspended imposition of sentence, he was not convicted and was not required to register under SORNA. So, given that neither SORA nor SORNA required registration of Roe, he and a co-plaintiff (no longer in the litigation) filed this case seeking a declaration that they need not register. During this litigation, Roe's registration requirement has again been held in abeyance. L.F. 67-68 at ¶ 31; L.F. 90-91 at ¶ 25.

While this case was pending in the trial court, Judge Callahan's judgment was appealed and, on April 26, 2011, the Missouri Court of Appeals handed down

opinions in *Doe v. Keathley*, 344 S.W.33d 759 (Mo. App. 2011), and a companion case, *Doe v. Replogle*, 344 S.W.3d 757 (Mo. App. 2011). The court held that federal law, not state law, controls the question of whether a prior state-court guilty plea, followed by probation and a suspended imposition of sentence, constitutes a conviction which triggers SORNA's registration requirements, and that, under federal law, such a state-court disposition constitutes a prior conviction. *See Doe*, 344 S.W.3d at 764-66; L.F. 68 ¶ 32; L.F. 91 ¶ 26. Therefore, although Roe had received a suspended imposition of sentence and, under Missouri law, for many purposes, he is not considered to be convicted, under federal law, he is convicted for purposes of whether he is subject to SORNA's registration requirement. *See*, *Doe*, 344 S.W.3d at 765-66; L.F. 68 at ¶ 33; L.F. 91 at ¶ 27.

Roe amended his petition, challenging the constitutionality of applying SORNA's registration requirement to him; Respondents moved for summary judgment on all counts which the trial court granted; and, Roe appeals. L.F. 7-20 (First Amended Petition); L.F. 29-103 (parties' Summary Judgment submissions); L.F. 104-105, A-1-A-3 (Judgment); L.F. 107-113 (Notice of Appeal).

POINTS RELIED UPON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT IV BECAUSE CONGRESS' DELEGATION TO THE ATTORNEY GENERAL OF SOLE AUTHORITY TO DETERMINE WHETHER SORNA APPLIES TO PRE-SORNA OFFENDERS, SUCH AS ROE, VIOLATES THE NONDELEGATION DOCTRINE IN THAT CONGRESS NEITHER CLEARLY DELINEATED THE POLICY OR STANDARD AND THE SCOPE OF THE AUTHORITY NOR PROVIDED MEANINGFUL CONSTRAINT

U.S. CONST. art. I, §§ 1, 8

Reynolds v. United States, 565 U.S. ___, 132 S.Ct. 1043 (2012)

Mistretta v. United States, 488 U.S. 361 (1989)

United States v. Fuller, 627 F.3d 499 (2d Cir. 2010) (Raggi, J., concurring), *abrogated on other grounds by Reynolds v. United States*

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I BECAUSE APPLICATION OF SORNA TO ROE VIOLATES THE PROHIBITION AGAINST EX POST FACTO LAWS IN THAT SORNA IMPERMISSIBLY ENHANCES THE PENALTY FOR THE SAME CRIME AND/OR CONTEMPLATES A NEW DUTY

U.S. CONST. art. I, § 9

Weaver v. Graham, 450 U.S. 24 (1981)

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT II BECAUSE MISSOURI NEED NOT REQUIRE ROE TO REGISTER IN THAT THE SORNA GUIDELINES DO NOT REQUIRE STATES TO REGISTER OFFENDERS LIKE ROE WHO HAD COMPLETED HIS INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM

76 Fed. Reg. 1630

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT III BECAUSE SORNA CONTEMPLATES YIELDING TO STATE CONSTITUTIONAL LAW IN THAT MISSOURI'S CONSTITUTION PROHIBITS REQUIRING REGISTRATION OF A PRE-1995 SEX OFFENDER

42 U.S.C. § 16925 (b)

152 CONG. REC. S. 8023

Doe v. Phillips, 194 S.W.3d 833 (Mo. *banc* 2006)

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT V BECAUSE NEITHER SORA NOR SORNA PROVIDE A BASIS TO PROSECUTE ROE FOR FAILURE TO REGISTER IN THAT, AS A PRE-1995 OFFENDER, ROE IS EXEMPT FROM SORA'S REGISTRATION REQUIREMENT AND HAS NOT TRAVELED IN INTERSTATE COMMERCE

Carr v. United States, 560 U.S. ___, 130 S.Ct. 2229 (2010)

18 U.S.C. § 2250

Doe v. Phillips, 194 S.W.3d 833 (Mo. *banc* 2006)

Doe v. Keathley, 290 S.W.3d 719 (Mo. *banc* 2009)

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT VI BECAUSE ROE'S SUBSTANTIVE DUE PROCESS RIGHTS ARE VIOLATED IN THAT REGISTRATION AND INCREASING BURDENS IMPOSED ON REGISTRANTS, NOT NARROWLY TAILORED TO SERVE COMPELLING INTERESTS, CUMULATIVELY IMPINGE ON ROE'S FUNDAMENTAL LIBERTY INTERESTS

U.S. CONST. amend. V

U.S. CONST. amend. XIV

Washington v. Glucksberg, 521 U.S. 702 (1997)

ARGUMENT

STANDARD OF REVIEW

The standard of review in a declaratory judgment case is the same as in any other court-tried case. "This Court will affirm the decision of the trial court 'unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *Commerce Bank, N.A. v. Blasdel*, 141 S.W.3d 434, 442 (Mo.App. W.D. 2004) (quoting *Kerperien v. Lumberman's Mut. Cas. Co.*, 100 S.W.3d 778, 780 (Mo. banc 2003) (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976))). The constitutionality of a statute is generally a question of law. *See*, *e.g.*, *State v. James*, 109 P.3d 1171, 1174 (Kan. 2005); *State v. Gales*, 694 N.W.2d 124, 149 (Nebr. 2005); *see also*, *City of Cape Girardeau v. Fred A. Groves Motor Co.*, 346 Mo. 762, 772, 142 S.W.2d 1040, 1045 (Mo. 1940) (the constitutionality of an ordinance is generally a question of law involving an interpretation of its terms, objects, purposes and practical operation rather than a question of fact). Further, interpretation of a statute is a question of law. *Smith v. Shaw*, 159 S.W.3d 830, 833 (Mo. banc 2005). "Questions of law are matters reserved for de novo review by the appellate court, and we therefore give no deference to the trial court's judgment in such matters." *Commerce Bank, N.A.*,

141 S.W.3d at 442 (quoting *H & B Masonry Co., Inc. v. Davis*, 32 S.W.3d 120, 124 (Mo.App. E.D. 2000)). The Court is bound to "exercise the power to set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." *Murphy*, 536 S.W.2d at 32. Additionally, because the appeal is from a grant of summary judgment, this Court must review the record in the light most favorable to the non-moving party, Roe, and he is afforded the benefit of all reasonable inferences from the record. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376, 382 (Mo. 1993). Only if it is shown that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law should this Court affirm the trial court's grant of summary judgment. MO. SUP. CT. R. 74.04 (c) (6).

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT IV BECAUSE CONGRESS' DELEGATION TO THE ATTORNEY GENERAL OF SOLE AUTHORITY TO DETERMINE WHETHER SORNA APPLIES TO PRE-SORNA OFFENDERS, SUCH AS ROE, VIOLATES THE NONDELEGATION DOCTRINE IN THAT CONGRESS NEITHER CLEARLY DELINEATED THE POLICY OR STANDARD AND THE SCOPE OF THE AUTHORITY NOR PROVIDED MEANINGFUL CONSTRAINT

The authority to legislate is entrusted to Congress. U.S. CONST. art. I, §§ 1, 8. By delegating to the Attorney General the broad authority to specify SORNA's applicability to those convicted of sex offenses prior to SORNA's enactment and implementation, Congress violated the nondelegation doctrine. *See* 42 U.S.C. § 16913 (d). "Congress manifestly is not permitted to abdicate or transfer to others the legislative functions with which it is [constitutionally] vested." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935). This "nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371 (1989). The doctrine is "derived from Article I, Section I of the Constitution, which states that '[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of Senate and House of Representatives.'" *United*

States v. Ambert, 561 F.3d 1202, 1212-13 (citing and quoting U.S. CONST. art I, § 1). Although the nondelegation doctrine does not prevent Congress from "obtaining the assistance of its coordinate branches," it can do so only if Congress gives clear guidance to the executive branch as to the intent of the legislation. *Mistretta*, 488 U.S. at 372-73.

"So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not forbidden delegation of legislative power.'" *Id*. at 372 (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (alteration in *Mistretta*). This means that Congress must "clearly delineate[ ] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id*. at 372-73 (citation and quotation omitted).[4] In *Panama Refining Co.*, the Supreme Court held that Congress had unconstitutionally authorized the Executive to make laws because "Congress had failed to articulate any policy or standard that would serve to

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[4]In *Mistretta*, unlike here, Congress gave the Sentencing Commission very specific and detailed guidance on how to promulgate the Sentencing Guidelines. *Id.* at 374. Thus, the Supreme Court found that Congress did not delegate its legislative duties to the Executive.

confine the discretion of the authorities to whom Congress delegated power." *Mistretta*, 488 U.S. at 374, n. 7; *see Panama Refining Co.*, 293 U.S. at 421 (Congress unconstitutionally, without any guidance, authorized the Executive to prohibit the transportation of excess petroleum, subject to fine and imprisonment).

Similarly, in SORNA, Congress failed to articulate any policy to guide the Attorney General on the retroactivity of the Act. Congress gave no guidance to the Attorney General as to whether (and for how long) *all* individuals who were convicted of *all* sex offenses prior to the Act should be subject to SORNA, regardless of the remoteness of their offenses, regardless of when they completed their sentences, and regardless of the nature of the offenses. (This is no small matter given the three-tiered structure created by SORNA which determines the length of time an offender must register based on the nature of the offense.) Instead, Congress gave the Attorney General sole discretion to determine who should be subject to SORNA's onerous registration requirements and harsh criminal penalties, without providing any boundaries within which to exercise that discretion.[5] In unbridled fashion, Congress handed the Attorney General the

[5]This is particularly troublesome in the case of Roe I, who, as the recipient of a suspended imposition of sentence pursuant to a guilty plea which he was advised was a good deal for him, is not, under Missouri law, even considered to

awesome power of legislating the breadth of the Act. This is no small delegation because in so doing, Congress gave the Attorney General the power to expand the class of people subject to SORNA's constraints by more than half a million. *See United States v. Fuller*, 627 F.3d 499, 509 (2d Cir. 2010) (Raggi, J., concurring), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. ___, 132 S.Ct. 1043 (2012) (citing 152 CONG. REC. S. 8012, 8013 (daily ed. July 20, 2006) (statement of Sen. Hatch) (estimating over 500,000 persons convicted of predicate sex offenses prior to enactment of SORNA)). Indeed, "[w]ithout any discernible principle to guide him or her in the statute," Congress gave the Attorney General the legislative freedom to "willy nilly a) require every single one of the estimated half million sex offenders in the nation to register under SORNA, b) through inaction, leave each of those half million offenders exempt from SORNA, c) do anything in between those two extremes, or d) change his or her mind on this question, making the statute variously prospective and retroactive." *Fuller*, 627 F.3d at 511 (Raggi, J., concurring) (quoting *United States v. Hinckley*, 550 F.3d

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have been convicted for most purposes. As a result, Roe cannot have his offenses reversed, vacated, or set aside nor can he obtain a pardon to be relieved of the SORA registration requirement, as provided for in MO. REV. STAT. § 589.400.3 (1) or (2).

926, 948 (10th Cir. 2008), *abrogated on other grounds by Reynolds*, 565 U.S. ___, 132 S.Ct. 1043 (Gorsuch, J., concurring) (citation omitted)).

In both *Fuller* and *Hinckley*, the concurring judges found that construing SORNA to permit delegation of such power to the Attorney General raises "substantial delegation concerns." *Fuller*, 627 F.3d at 512 (Raggi, J., concurring); *Hinckley*, 550 F.3d at 948 (Gorsuch, J., concurring). Consequently, both relied on the doctrine of constitutional avoidance to find that Congress did not delegate to the Attorney General the sole authority to determine the applicability of SORNA to pre-enactment offenders. *Id.* In *Reynolds*, the Supreme Court nevertheless held that Congress did delegate such authority to the Attorney General in § 16913 (d). Although the majority in *Reynolds* "expressed no view" on Reynolds' nondelegation claim, *Reynolds*, 565 U.S. at ___, 132 S.Ct. at 981[6], the concurring

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[6]Finding that the plain meaning of § 16913 (d) compelled the interpretation given it by the Court, Justice Breyer, writing for the majority, explained that

> [a]sking the Department of Justice, charged with responsibility for implementation, to examine these pre-Act offender problems and to apply the new registration requirements accordingly could have represented one efficient and desirable solution (though we express no view on Reynolds' related constitutional claim). *Cf.* 42 U.S.C. §§ 16912 (b), 16914 (a)(7), (b)

judges in *Fuller* and *Hinckley* would certainly now find SORNA violates the nondelegation doctrine.

In *Reynolds*, Justice Scalia, joined by Justice Ginsburg, in dissent, wrote:

> Indeed, it is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide – with no statutory standard whatever governing his discretion – whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable . . ..

Reynolds, 132 S.Ct. at 986 (2012) (Scalia, J., dissenting). Justice Scalia also applied the doctrine of constitutional avoidance to find that Congress did not delegate the Attorney General such power in SORNA. *Id.* But, as noted above, the *Reynolds* majority clearly held that SORNA *did* assign the Attorney General such power. *Reynolds*, 132 S.Ct. at 981. Thus, under this binding interpretation, it now follows that Justice Scalia is of the belief that SORNA is unconstitutional under the nondelegation doctrine and that Justice Ginsburg, who joined him in

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> (7), 16919, 16941, 16945 (granting the Attorney General authority to administer various aspects of the Act). And that is just the solution that the Act's language says that Congress adopted.

Reynolds, 132 S.Ct. at 981-82.

dissent in *Reynolds* would likely concur.

Prior to *Reynolds*, several circuits found that SORNA's registration provisions, SORNA's statement of purpose in 42 U.S.C. § 16901[7], and SORNA's broad policy goals are sufficient guiding intelligible principles. *See*, *e.g.*, *United States v. Guzman*, 591 F.3d 83, 93 (2d Cir. 2010) (concluding that the Attorney General's delegated authority is "highly circumscribed" because SORNA "includes specific provisions delineating what crimes require registration; where, when, and how an offender must register; what information is required of registrants; and the elements and penalties for the federal crime of failure to register") (citations omitted)); *United States v. Burns*, 418 Fed. Appx. 211, 211-12 (4th Cir. March 2011) (unpublished) (the Attorney General's authority was "substantially bounded by the policies and requirements set forth in SORNA, as well as the elements spelled out in the failure-to-register statute."); *United States v. Whaley*, 577 F.3d 254, 264 (5th Cir. 2009) (stating that SORNA's statement of purpose in 42 U.S.C. § 16901 is a guiding intelligible principle); *United States v.*

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[7]Section 16901 of SORNA sets forth the following legislative purpose:

> In order to protect the public from sex offenders and offenders against children . . . Congress in this chapter establishes a comprehensive national system for the registration of those offenders.

Ambert, 561 F.3d at 1213-14 (describing SORNA's broad policy goals as a guiding intelligible principle)).

These decisions are wholly unpersuasive because there is nothing in SORNA's registration provisions, statement of purpose, or broad policy goals that even touches upon pre-enactment offenders. As Judge Raggi eloquently explained in her concurrence in *Fuller*:

> I agree that the SORNA provisions cited in *Guzman* and *Ambert* may indicate *how* persons to whom the statute applies may satisfy its requirements or be prosecuted for failing to do so. But I respectfully fail to see what guidance these provisions provided to the Attorney General in exercising legislative authority to decide whether or not SORNA's registration requirements should apply to prior offenders at all . . .. Nor does the statutory purpose of creating a comprehensive national system for registration hint as to what factors, if any, might counsel *against* applying the Act's registration requirements to prior offenders. The Attorney General could simply flip a coin, and thereby make the more than 500,000 persons convicted of sex offenses before July 27, 2006, subject to SORNA's registration requirements – or not.

Fuller, 627 F.3d at 511 (Raggi, J., concurring) (citations and quotations omitted).

And, as Judge Raggi further elaborated:

> . . . these concerns are [not] dispelled by the fact that the Attorney General's authority under § 16913 (d) would apply only to a particular capped class of offenders . . .. A delegation of authority to determine the potential criminal exposure of half a million people cannot be deemed narrow.

Id. at 511 (citations and internal quotations omitted).

The constitutional nondelegation problem here is even further "aggravated by the fact" that "without any meaningful guidance," Congress "delegated to the Attorney General, the very officer charged with executive power to enforce the criminal laws, the legislative power unilaterally to pronounce the scope of a law with criminal consequences." *Id*. at 511-12. This heightens separation of powers concerns here. *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.") (internal quotation marks omitted). As Judge Raggi explained, this dangerous intersection between legislative and executive powers is why the Supreme Court has likely suggested that "greater congressional specificity" might be required of delegations in the criminal context." *Fuller*, 627 F.3d at 512 (Raggi, J., concurring) (citing *Touby v. United States*, 500 U.S. 160, 165-66 (1991); *see also United States v. Dhafir*, 461 F.3d 211, 216 (2d Cir. 2006)). Indeed, "delegations that have been previously upheld in the criminal

context have been accompanied by rigorous, 'meaningful constraints, not only on the scope of the delegated authority, but also on the manner of its exercise.'" *Fuller*, 627 F.3d at 512 (Raggi, J., concurring) (citing *Touby*, 500 U.S. at 166 (upholding delegation where Attorney General was required, *inter alia*, to that exercise of authority was "'necessary to avoid an imminent hazard to the public safety'" (quoting 21 U.S.C. § 811 (h) (1))) and *Dhafir*, 461 F.3d at 216 (upholding delegation where the "'authorities granted to the President . . . may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared.'" (brackets omitted) (quoting 50 U.S.C. § 1701 (b))). In sharp contrast, here, Congress gave sweeping power to the Attorney General without any guiding principle – let alone "meaningful constraints."

If Congress intends any law, particularly one like SORNA, to have retroactive effect, it must follow the path charted in the Constitution. But here, Congress explicitly handed a quintessentially legislative function to an official in the Executive branch – the top law enforcement official – charged with prosecuting the very individuals who, (s)he alone, would have discretion to determine would or would not be subject to SORNA's registration requirement and criminal penalties. 42 U.S.C. § 16913. As such, Congress abandoned its proper role and violated the nondelegation doctrine and separation of powers. As a result, § 16913 of SORNA is unconstitutional as applied to pre-SORNA

offenders like John Roe I and this Court should so hold, reversing the trial court's grant of summary judgment on Count IV.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT I BECAUSE APPLICATION OF SORNA TO ROE VIOLATES THE PROHIBITION AGAINST EX POST FACTO LAWS IN THAT SORNA IMPERMISSIBLY ENHANCES THE PENALTY FOR THE SAME CRIME AND/OR CONTEMPLATES A NEW DUTY

As indicated, *supra* at 11, 14-15, Roe is not required to register under Missouri's SORA because as to him it is retrospective in application. *Doe v. Phillips*, 194 S.W.3d at 852. So, any obligation on Roe to register as a sex offender arises only under SORNA. Although in *Doe v. Keathley* and *Doe v. Replogle*, the Missouri Court of Appeals held that SORNA's application to individuals who were convicted of sex offenses prior to the statute's enactment does not violate the *ex post facto* clause, and other courts have agreed, Roe respectfully maintains that the contrary is, in fact, the case. Imposition of SORNA's registration requirements, or a prosecution of Roe pursuant to SORNA's criminal offense statute, 18 U.S.C. § 2250 (a), for failure to register as to him constitutes a violation of the *Ex Post Facto* Clause of the United States Constitution, U.S. CONST. art. I, § 9, because it impermissibly enhances the

penalty for the same crime and/or because SORNA contemplates a new duty, which would render Roe guilty of failing to register at the moment SORNA passed and its retroactive application would thus impose an "impossible duty" on Roe.

As applied to Roe, SORNA satisfies the "two critical elements [that] must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment [*i.e.*, Roe's pre-SORNA guilty plea], and it must disadvantage the offender affected by it [Roe would be required to register and/or be prosecuted for failure to register]." *Weaver v. Graham*, 450 U.S. 24, 29 (1981) (internal citation omitted). Therefore, the trial court erred in granting summary judgment on Count I and this Court should reverse.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT II BECAUSE MISSOURI NEED NOT REQUIRE ROE TO REGISTER IN THAT THE SORNA GUIDELINES DO NOT REQUIRE STATES TO REGISTER OFFENDERS LIKE ROE WHO HAD COMPLETED HIS INVOLVEMENT IN THE CRIMINAL JUSTICE SYSTEM

The U.S. Attorney General's SORNA guidelines establish that Roe need not be subject to the registration requirement for Missouri to be considered as having substantially implemented SORNA. (Indeed, the SMART Office has declared that Missouri has substantially implemented SORNA already.[8]) These guidelines state:

> it will be deemed sufficient for substantial implementation if jurisdictions register sex offenders with pre-SORNA or pre-SORNA-implementation sex offense convictions who remain in the system as prisoners, supervisees, or registrants, or who reenter the system through a subsequent criminal conviction.
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> * * *

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[8] *Jurisdictions That Have Substantially Implemented SORNA* (visited June 29, 2012), Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, <http://www.ojp.usdoj.gov/smart/newsroom_jurisdictions_sorna.htm>.

> These supplemental guidelines accordingly are modifying the requirements for substantial implementation of SORNA in relation to sex offenders who have fully exited the justice system, *i.e.*, those who are no longer prisoners, supervisees, or registrants. It will be *sufficient if a jurisdiction registers such offenders who reenter the system through a subsequent criminal conviction in cases in which the subsequent criminal conviction is for a felony, i.e., for an offense for which the statutory maximum penalty exceeds a year of imprisonment.* This allowance is limited to cases in which the subsequent conviction is for a non-sex offense. As noted above, a later conviction for a sex offense independently requires registration under SORNA, regardless of whether it is a felony or a misdemeanor.

76 Fed. Reg. 1630, 1639-40 (emphasis added).

While jurisdictions are free to "look more broadly", Roe should be exempted from registration under SORNA because he had completed his involvement in the criminal justice system at the time SORNA became effective since he was not required to register pursuant to Missouri's SORA under *Doe v. Phillips*, 194 S.W.3d 833. This is especially so given Missouri's constitutional prohibition on retrospective application of SORA to offenders convicted prior to

January 1, 1995.[9]

Because the Attorney General's own guidelines would exempt Roe from registration, given that he had completed his involvement with the Missouri criminal justice system[10], the trial court erred in granting summary judgment as to

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[9]Indeed, as noted in *United States v. Johnson*, 632, F.3d 912, 920 (5th Cir. 2011), SORNA does not require the states to comply with its directives; rather, the statute allows jurisdictions to decide whether to implement its provisions or lose ten percent of their federal funding otherwise allocated for criminal justice assistance.

[10]In a recent case, *United States v. Kebodeaux*, 687 F.3d 232 (5th Cir. 2012), the Fifth Circuit Court of Appeals ("Fifth Circuit") found SORNA unconstitutional as applied to federal sex offenders who had completed their sentences and had been unconditionally released, finding that an offender's "commission of a Federal crime is an insufficient basis for Congress to assert unending criminal authority over him." *Id.* at 234. The Fifth Circuit's holding was "limited to the specific and limited facts" of that case and the federal registration requirement was found unconstitutional on "narrow grounds." *Id.* The Fifth Circuit stated that it did "not call into question Congress's ability to impose conditions on a prisoner's release from custody, including requirements

that sex offenders register intrastate changes of address after release. *After* the federal government has *unconditionally* let a eprson free, however, the fact that he once committed a crime is not a jurisdictional basis for subsequent regulation and possible criminal prosecution. Some other jurisdictional ground, such as interstate travel is required." *Id.* at 234-35 (emphases original). The Fifth Circuit drew a distinction between SORNA's requirements and probation or supervised release – stating that "[u]nlike the situation involving probation or supervised release, SORNA's sex-offender-registration requirements (and § 2250(a)(2)(A)'s penalties) were not a condition of [the offender's] release from prison, let alone a punishment for his crime." *Id.* at 238. The Fifth Circuit's finding expressly excluded

> the registration requirements for (1) any federal sex offender who was in prison or on supervised release when the statute was enacted in 2006 or (2) any federal sex offender convicted since then. Instead, it applies only to those federal sex offenders whom the government deemed capable of being unconditionally released from its jurisdiction before SORNA's passage in 2006. [Footnote 4 omitted.] Moreover, even as to those sex offenders, it means only that Congress could treat them exactly as all state sex offenders already are treated under federal law. It also has no impact on state

Count II and this Court should reverse.

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT III BECAUSE SORNA CONTEMPLATES YIELDING TO STATE CONSTITUTIONAL LAW IN THAT MISSOURI'S CONSTITUTION PROHIBITS REQUIRING REGISTRATION OF A PRE-1995 SEX OFFENDER

SORNA provides for circumstances, as are present in Missouri, in which the highest court of a jurisdiction has held that the jurisdiction's constitution is in some respect in conflict with SORNA requirements:

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regulation of sex offenders.

Id. at 235. The United States Supreme Court has granted *certiori* and argument is set for April, 2013. *United States v. Kebodeaux*, ___ U.S. ___, 133 S.Ct. 928 (Jan. 11, 2013).

While the *Kebodeaux* holding is limited, the notion that the commission of a long ago sex crime (for which, in this case, the offender received a suspended imposition of sentence), irrespective of its relative heinousness or the offender's likelihood of recidivism, is an insufficient basis to "assert unending criminal authority over" someone long ago unconditionally set free is akin to the Guidelines' declaration that substantial implementation does not require registration of sex offenders who have fully exited the justice system.

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter

> because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

42 U.S.C. § 16925 (b).

> Commenting on this legislation, Senator Ted Kennedy stated:
>
> . . . section [16925] . . . is very important. Each State will face challenges in the implementation of these new Federal requirements, and States should not be penalized if exact compliance with the act's requirements would place the State in violation of its constitution or an interpretation of the State's constitution by its highest court.

152 CONG. REC. S. 8023 (daily ed. July 20, 2006) (statement of Sen. Kennedy).

Because of *Doe v. Phillips*, 194 S.W.3d 833, Missouri may not, of its own accord, implement by use of Missouri's SORA, sex offender registration for persons whose convictions were on or before January 1, 1995. Because of the holding of *Doe v. Keathley*, 290 S.W.3d 719, that SORNA imposes an independent registration requirement irrespective of any allegedly retrospective state law that might be subject to Missouri's constitutional ban on retrospective state laws, Missouri must reconcile and/or meld these two opinions by not

implementing what SORNA prefers but does not mandate where doing so violates Missouri's constitution.

42 U.S.C. § 16925 permits exceptions and does not require that funding be cut off from states where the state constitution is in conflict with SORNA. Applying SORNA's registration requirements retroactively/retrospectively to persons whose Missouri sex offenses predate January 1, 1995 in accordance with the Attorney General's opinion conflicts with the Missouri constitution but, per § 16925, giving deference to Missouri's state constitutional prohibition on retrospective laws does not require withholding funds from Missouri for less than full implementation. And, as indicated above, Missouri has been determined to have substantially implemented SORNA and would suffer only by ten percent. *See supra* at fn. 8.

In sum, implementing SORNA by use of Missouri's SORA registration regime to those whose convictions predate January 1, 1995, is elective – not mandatory – under SORNA, and is prohibited by *Doe v. Phillips*. Therefore, since SORNA does not so require it, Roe should be exempt from registration under SORNA; the trial court should have denied summary judgment as to Count III; and, this Court should reverse.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT V BECAUSE NEITHER SORA NOR SORNA PROVIDE A BASIS TO PROSECUTE ROE FOR FAILURE TO REGISTER IN THAT, AS A PRE-1995 OFFENDER, ROE IS EXEMPT FROM SORA'S REGISTRATION REQUIREMENT AND HAS NOT TRAVELED IN INTERSTATE COMMERCE

Roe's failure to register cannot be a violation of Missouri's SORA because of *Doe v. Phillips*. But Roe cannot be prosecuted for failure to register under SORNA either. But if, Roe's failure to register is a violation of the separate obligation to register created by SORNA, *Doe v. Keathley*, 290 S.W.3d at 720, it may be prosecuted criminally in federal court pursuant to 18 U.S.C. § 2250. Prosecutions under § 2250, however, are limited to an individual who is required to register under SORNA and who:

> (2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> (B) travels in interstate or foreign commerce, or enters or

leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act.

Since the enactment of SORNA in 2006, Roe has not traveled in interstate or foreign commerce nor has he entered, left, or resided in Indian country. Roe's conviction for a sex offense predates both enactment and implementation of SORNA, and until he travels in interstate or foreign commerce, he cannot be prosecuted under SORNA. *Carr v. United States*, 560 U.S. ___, 130 S.Ct. 2229, 2242 (2010). Accordingly, there can be no criminal prosecution, state or federal, for Roe's non-registration and the trial court erred in granting summary judgment on Count V. This Court should enjoin Respondents from any prosecution of Roe for non-registration unless and until he travels in interstate commerce.

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON COUNT VI BECAUSE ROE'S SUBSTANTIVE DUE PROCESS RIGHTS ARE VIOLATED IN THAT REGISTRATION AND INCREASING BURDENS IMPOSED ON REGISTRANTS, NOT NARROWLY TAILORED TO SERVE COMPELLING INTERESTS, CUMULATIVELY IMPINGE ON ROE'S FUNDAMENTAL LIBERTY INTERESTS

Roe I maintains that requiring him to register, including being subjected to the dissemination of his registration information published on the Internet, along with the additional restrictions that are imposed on offenders required to register, cumulatively have become so substantial and onerous as to violate his substantive due process rights. *See Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 7-8 (2003) (where claim is that law is defective because it conflicts with a provision of the Constitution it is a substantive due process challenge; that claim not before the Court); at 9 (Souter, J., concurring) (claim that dissemination of registry information violates substantive due process not foreclosed by majority's holding).

The Due Process Clause guarantees more than fair process, and the "liberty" it protects includes more than the absence of physical restraint. *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061, 1068-1069, 117 L.Ed.2d 261 (1992) (Due Process Clause "protects individual liberty

against 'certain government actions regardless of the fairness of the procedures used to implement them' ") (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 (1986)). The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests. *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1446-1447, 123 L.Ed.2d 1 (1993); [*Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)]. In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); to use contraception, *ibid.*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952), and to abortion, *Casey*, supra. We have also assumed, and strongly suggested, that the Due Process

Clause protects the traditional right to refuse unwanted lifesaving medical treatment. [*Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278-79 (1990)].

* * *

Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively,"deeply rooted in this Nation's history and tradition," *id.*, at 503, 97 S.Ct., at 1938 (plurality opinion); *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934) ("so rooted in the traditions and conscience of our people as to be ranked as fundamental"), and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest. *Flores*, *supra*, at 302, 113 S.Ct., at 1447; *Collins*, *supra*, at 125, 112 S.Ct., at 1068; *Cruzan*, *supra*, at 277-278, 110 S.Ct., at 2850-2851. Our Nation's history, legal traditions, and practices thus provide the crucial "guideposts for responsible decisionmaking," *Collins*, *supra*, at 125, 112 S.Ct., at 1068, that direct and restrain our

> exposition of the Due Process Clause. As we stated recently in *Flores*, the Fourteenth Amendment "forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." 507 U.S., at 302, 113 S.Ct., at 1447.

Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

Rooted in this Nation's history and tradition and conscience of our people and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if it is sacrificed is the right to legal repose – akin to the revered concept of *res judicata* – to be secure in the knowledge that the thing is decided in all its aspects and will not be revisited nor will new consequences ensue. Almost inherently, Americans (who revel in second chances and second acts, *see*, *e.g.*, Martha Stewart, Michael Vick, Josh Hamilton, and countless others) believe in the fundamental notion that if you pay your debt to society, the matter is concluded, and the individual returns to society. It is the layman's natural understanding and application of the concept of ordered liberty. What happened to Roe undermines confidence in the criminal justice system. Any American citizen would expect to be able to do as Roe did in 1994: reach a plea agreement accepting as punishment probation and suspended imposition of sentence which would not result in a conviction; live up to the terms of his probation; engage in family reunification;

and to be able to rely on the advice of his counsel, the prosecutor, and the judge that it was an outcome that would end the matter. But for Roe, it has not been the end of the matter. Despite having ceded the right to prove his innocence and despite having paid his societal debt, there has been no legal closure. The government has changed the rules after the matter was supposed to have been finished.

Despite what today's social media whirl might suggest, Americans also embrace as a fundamental aspect of liberty the right to live one's life quietly, out of the spotlight, and without their past crimes (or even indiscretions) being disseminated on the Internet. Other rights are impinged by registration and dissemination of registration data in conjunction with other restrictions placed on those who must register. Pursuant to MO. REV. STAT. § 589.414.6, each person required to register under § 589.400 must now provide all online identifiers (as described in MO. REV. STAT. § 43.651) associated with him or her including: electronic mail address and instant message screen name, user ID, cell phone number or wireless communication device number or identifier, chat or other Internet communication name, or other identity information. In addition, MO. REV. STAT. § 589.426 requires persons required to register to avoid all Halloween-related contact with children; to remain inside his or her residence between 5:00 p.m. and 10:30 p.m. unless required to be elsewhere (work or due to medical

emergency); to post a sign at his or her residence stating, "No candy or treats at this residence"; and, to leave all outside lighting off during the evening hours after 5:00 p.m. or be guilty of a class A misdemeanor. These restrictions on registrants, added to the original reporting requirements, cumulatively deprive Roe of substantive due process.

It is tempting to conclude that protecting children and the public as a whole are compelling interests. Perhaps so, but neither SORA nor SORNA are narrowly tailored to serve those interests, sweeping into their registration nets individuals who pose no harm for children and the public as a whole. The fact that Judge Moran long ago concluded that family reunification was appropriate and that Roe's stepdaughter could return to live with Roe and her mother suggests that children and the public as a whole are not and never were threatened by Roe and need no protection from him.

Given that Roe possesses carefully described fundamental liberty interests cumulatively impinged upon by registration and related restrictions that are not narrowly tailored to serve the asserted compelling interests of protecting children and the public as a whole, the trial court erred in granting summary judgment on Count VI. This Court should reverse; hold that applying SORNA's and/or SORA's registration requirements to Roe violates his substantive due process rights and is unconstitutional; and declare that he is exempt from registration for

that reason.

CONCLUSION

For all of the above reasons, this Court should reverse the trial court's grant of summary judgment and remand for issuance of a declaration that Roe is exempt from registration under both SORNA and SORA and enjoin any prosecution for not having registered.

Respectfully submitted,

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February 20, 2013

IN THE MISSOURI SUPREME COURT

JOHN ROE,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. SC92978
	)	
COLONEL RON REPLOGLE, et al.,	)	
	)	
Respondents.	)	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of MO. SUP. CT. R. 84.06(b). It contains no more than 31,000 words of text (specifically, containing 9,496 words). It was prepared using Word Perfect X4 for Windows and converted to portable document format. I further certify that the original was signed by attorney for the appellant and this brief is otherwise in accordance with MO. SUP. CT. R. 55.03.

By s/ Jamie Kathryn Lansford
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IN THE SUPREME COURT OF MISSOURI

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	)	
Appellant,	)	
	)	
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	)	
COLONEL RON REPLOGLE, et al.,	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2013, the above Appellant's Brief and Appellant's Appendix were filed with the Court via the Court's electronic filing system and a copy was served via the same system on counsel listed below:

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